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October 17, 2008

The Honorable James L. Oberstar
Chairman
Committee on Transportation and Infrastructure
U.S. House of Representatives
2165 Rayburn Building
Washington, DC 20515

The Honorable John Mica
Ranking Member
Committee on Transportation and Infrastructure
U.S. House of Representatives
2163 Rayburn Building
Washington, DC 20515

Dear Chairman Oberstar and Ranking Member Mica:

President Bush signed into law the Energy Independence and Security Act of 2007 ("EISA"), Pub. L. 110-140, on December 19, 2007. Included in EISA are provisions to prevent the sole rescission of Congestion Mitigation Air Quality (CMAQ) funds, as is the practice by some states. Current interpretations by some state departments of transportation and the Federal Highway Administration (FHWA) include planning as a separate "program" subject to funding rescissions. This position amounts to a double cut for planning and threatens to undermine the ability of many metropolitan areas to meet federal requirements for transportation planning. Prior to enactment of EISA, states had not rescinded planning funds. We believe that alongside critical programs like safety, the practice until recently pointed to the importance of planning in the very nature that the funds were not repealed. We respectfully request that Congress clarify the interpretation of FHWA on this important issue to exclude metropolitan planning from the programmatic rescissions required under the Energy Independence and Security Act of 2007.

FHWA was asked to issue guidance to the States acknowledging the statutory standing of planning under Title 23 as a funding set aside and not as a separate program subject to additional rescissions over and above reductions to core programs. FHWA reiterated its position that rescissions apply to core programs and planning apportionments although the State Planning and Research (SPR) funds are not subject to rescission. SPR and planning funds support similar activities although one is at the state level and the other at the metropolitan level.

Some States have interpreted EISA to allow funds set aside for metropolitan planning ("PL" funds) under Title 23 to be proportionately rescinded on the same basis as funds for highway programs. Further, some States have proposed to adjust upwardly the rescission of PL funds to the maximum 110% of a proportionate share. We also understand that some states do not consider funds "programmed" in the Unified Planning Work Program (UPWP) and therefore eligible for rescission.

In contrast, planning funds are not apportioned in the manner of highway "programs," but rather are taken off the top of the overall Congressional appropriations pursuant to 23 U.S.C. § 104(f), which provides under the heading "Metropolitan Planning" that: "the Secretary shall set aside 1.25 percent of the funds authorized to be appropriated for the interstate maintenance, national highway system, surface transportation, congestion mitigation and air quality improvement, and highway bridge replacement and rehabilitation *programs* authorized under this title to carry out the requirements of § 134 [relating to

metropolitan planning]" (emphasis added).¹ Although the overall set-aside pool created by § 104(f) is then sub-allocated to states, there is no indication in § 104 that the PL set-aside is considered a "program" subject to rescission as that term is used in EISA.

Indeed 23 U.S.C § 104(b) itself recognizes that the planning set-aside is separate from the highway program allocation by requiring that the Secretary of Transportation "after making the set-asides authorized by subsections (d) and (f) [the set aside for planning] and § 130(e), shall apportion the remainder of the sums authorized to be appropriated for expenditure on the Interstate and National Highway System program, the Congestion Mitigation and Air Quality Improvement program, the Highway Safety Improvement program, and the Surface Transportation program," in other words, to the programs other than PL that are subject to rescission. We note that FHWA has determined that State Planning and Research funds (SPR) are not subject to rescission, and PL funds are by law on similar footing.

The consequences of improper rescission of PL funds could be dire. Among other repercussions, rescission of PL funds would result in unfunded federal mandates related to air quality, congestion management, transit planning, long range transportation planning, public involvement and other processes required to be undertaken prior to initiation and throughout the project development cycle. Similarly, completion of planning requirements is regularly mapped in the Unified Planning Work Programs adopted annually (or bi-annually) by local entities through local processes.

We, the undersigned, assert that the interpretation by the Federal Highway Administration of § 1132 contained in P.L. 110-140 runs contrary to Congressional intent for both the goals of EISA and metropolitan planning, and respectfully request that Congress clarify the language of EISA to exclude metropolitan planning from the programmatic rescissions called for in the Energy Independence and Security Act of 2007.

Thank you for your consideration of this request.



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Association of Metropolitan Planning Organizations



Paul Farmer, Executive Director
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Matthew Chase, Executive Director
National Association of Development Organizations



Fred Abousleman, Executive Director
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¹ This set aside for metropolitan planning is similar to the funding earmarked for USDOT administrative expenditures under 23 U.S.C. § 104(a). Prior to the 2005 SAFETEA amendments, funding for federal expenditures was accomplished through a similar off-the-top percentage set aside from various program funds; however, with the passage of SAFETEA, Pub. L. 109-59, Congress specified fixed dollar amounts as authorizations for federal administrative expenditures.